Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

TABCOR SALES CLEARING, INC.,
Petitioner,

No. 79-1901 vs.

DEPARTMENT OF THE TREASURY,
Respondent.

TABCOR SALES CLEARING, INC., a Nevada corporation,
Petitioner,

No. 80-1768 vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

J. RICHARD DEMA, et al.,
Petitioners,

No. 80-2547 vs.

DAVID J. FEDDOR, et al.,
Respondents.

J. RICHARD DEMA, et al.,
Petitioners,

No. 80-2592 vs.

DAVID J. FEDDOR, et al.,
Respondents.

J. RICHARD DEMA, et al.,
Petitioners,

No. 81-1055 vs.

DAVID J. FEDDOR, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can summary judgment be granted on the issue of qualified immunity when the defendant's assertion of good faith in an affidavit has been rebutted by his proven lack of credibility, deposition testimony, and counter affidavits raise the falsity of the assertion?

2. Can the Section 2680(c) exclusion of the Federal Tort Claims Act be applied as a matter of law when it has been asserted that the IRS investigation itself was unlawful?

3. Is executive privilege a/k/a "deliberative privilege" constitutionally authorized?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 21, 1981. Rehearing *En Banc* was denied on August 26, 1981.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is "unpublished". Therefore, it is printed in full in the Appendix hereto.

JURISDICTION

Jurisdiction is predicated on Title 28 U.S.C. Section 1254(1); 62 Stat. 928.

STATEMENT

The judicial history of this matter commenced with the Government's filing of an IRS summons enforcement proceeding (74 C 1283) in the District Court against J. Richard Dema, President of Tabcor, Inc. (hereafter, "Tabcor"). This summons enforcement proceeding was preceded by a long, intensive, harrassing and abusive IRS "investigation". The subject of that investigation concerned an allegation that the independent contractors who worked for Tabcor should be retroactively "reclassified" as employees. See, Petition for Writ of Certiorari, incorporated herein by reference, number 76-755, filed in this Court on December 2, 1976.*

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* Pursuant to Tabcor's (first) Petition for a Contempt Citation against the IRS Agent, the District Court in an unprecedented ruling enjoined the IRS from further summons issuances finding that the IRS Agent, David J. Feddor, had acted in bad faith. The government appealed that order and a divided Court of Appeals reversed and remanded. 544 F.2d 1373 (7th Cir., 1976).

This Court denied *cert.* on the AntiInjunction Act issue. See, 429 U.S. 1093. On remand, the District Court dismissed the summons enforcement proceeding *with* prejudice and no further appeal was taken by the Government.

Assessments were levied against Tabcor for over $410,000.00 and Tabcor, was, thereafter, forced to file a "refund" suit in the District Court (75 C 2401). The damage aspects of this "refund" suit were, without prejudice to refiling, ruled to be beyond the scope of a "refund" suit.

Without a trial, this case resulted in a judgment in favor of Tabcor on the substantive issues. Government did not appeal. Subsequently, two postjudgment contempt petitions (Second and Third) were filed to force the IRS to stop its continuing harassment against Tabcor. The failure of the District Court to take action on one of these was the subject of Appeal Docket No. 80-1768. The third contempt has never been the subject of an appeal.

The damage case Tabcor was forced to file separately (77 C 3103) had a tortuous path to a ruling, having been transferred through three judges. Judge Flaum's opinion can be found at 470 F. Supp. 152 (N.D. Ill. 1979). After this Court's ruling in *Davis* v. *Passman*, ... U.S. ..... (1980) the case was "transferred" to another judge. This other judge thereafter dismissed the case, without a trial, ruling that Agent Feddor's affidavit that he had acted in good faith was sufficient to permit summary judgment on the issue of qualified immunity.

This was done even though counter-affidavits were filed alleging that Feddor could not be believed (Judge Marovitz in the summons enforcement proceeding had found in him to be a witness not worthy of belief) and that Feddor's statement was false.* See, Appendix.

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* This Judge also slurred Tabcor's counsel without a hearing. This has become an ever increasing practice against lawyers who are unpopular with the IRS and this Court is requested to take judicial notice of this fact.

The allegations of the damage case include assertions that Tabcor had been "targeted" for "reclassification" as a representative of one of over thirty industries targeted under the Nixon Administration's IRS conspiratorial campaign against American businessmen. See Appendix. Because the Department of Justice stonewalled discovery in the damage case, a FOIA suit was instituted to obtain "smoking gun" evidence of the Treasury/IRS conspiracy. Judge Marshall ruled, without a trial, that this evidence was barred from disclosure because of executive privilege. See, 471 F. Supp. 436 (N.D. Ill. 1979).

All of these cases were consolidated on Appeal. Appeal Nos. 80-1138, 80-1205 and 80-1982 for which consolidation was denied became "tag along" appeals.** An adverse ruling resulted in an "unpublished opinion." Rehearing *en banc* was denied on August 26, 1981.

** *Cert.* is sought separately for these appeals, which resulted in a separate unpublished ruling, adverse to Petitioner.

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals Improperly Ruled That A Subjective State Of Mind Such As Qualified Immunity Can Be Disposed Of By Summary Judgment By Affidavit Of The Agent, When The Agent's Own Discovery Deposition Is Contrary To His Claim Of Good Faith, Counter Affidavits Are Asserted, And There Was Objective Evidence Of The Agent's Bad Faith And Lack Of Credibility In The Prior Summons Enforcement Proceeding.

Qualified immunity cannot be used in such a procedural manner as here to provide absolute immunity. Dema and Tabcor have been waylaid on the way to a trial. Sec. 42 U.S.C. Sec. 1985 (2). Summary judgment was an improper method of case disposition under these circumstances.

Furthermore, a subjective state of mind, *viz*: bad faith, cannot be disproved by affidavits which claim good faith but present no objective facts other than a *Nurenberg* defense to bolster that claim. A jury trial is required on the Fifth Amendment *Bivens* claim.

II.

Petitioners Claim Of A Bad Faith And Outlaw Investigation Although One Made Within The Scope Of Employment Of The Agent Makes The Application Of The Tort Claims Act Exclusion Of Section 2680(c) An Issue Of Fact For Trial And A Bivens Count And A FTCA Count Are Coextent.

Carlson v. *Green*, ... U.S. ..... (1980) predicated and affirmed the appropriate disposition for this case. The trial by the Judge on the FTCA count and a jury trial on *Bivens*.

III.

The Court Of Appeals Improperly Ruled That Executive Privilege Is Constitutionally Authorized And That It Would Bar Disclosure Under FOIA Exemptions (b)(5) Even Though A Requested Trial On The Issue Of Bad Faith Had Been Refused.

The "monkey business" utilized to cover-up the Nixon plot to "sic the IRS" on *them* should not be allowed to hide behind the so-called doctrine of executive privilege—a doctrine *specifically* rejected by the founding fathers and, also, by this Court. See, *Halperin* v. *Kissinger*, ... U.S. ..... (1981).

Petitioner has claimed governmental wrongdoing. No trial has ever been allowed to permit the evidentiary disclosures that would be made. The *in camera* disclosure made to Judge Marshall should be shared by the American public—a public attuned and able to handle such high level conspiracies.*

CONCLUSION

Petitioner tried to warn this Court of the damage overcoming this Court concerning its sanctioning the continuing IRS abuse of Congressional authority (See Cert. Pet., Docket No. 76-755). It is never too late for a Court to do justice. Certiorari should be granted here to permit full briefing in this Court. This is a judicial issue. IRS Agents

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* We feel that this information should be shared with this Court. It is for this reason that we requested the Court of Appeals Record to be certified and transmitted here. Unfortunately, the sealed *in camera* material referred to in Judge Marshall's opinion have not, to our knowledge, been sent to the Clerk, although we have requested it. See Appendix.

were never intended to be immune to the extent determined by the 7th Circuit below and that this has reached the "60 Minutes" stage should be an indication that these are important issues worthy of a full review.

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APPENDIX

APPENDIX

APPENDIX A

Nos. 79-1901, 80-1768, 80-2592, 81-1055

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX B

Nos. 79-1901, 80-1768, 80-2547, 80-2592 and 81-1055

ORDER

These consolidated appeals are from:

1) the grant of summary judgment in favor of the defendant Department of Treasury on plaintiff's, Tabcor Sales Clearing, Inc. (Tabor), Freedom of Information Act (FOIA) claim on the basis of privilege (79-1901);

2) denial of Tabcor's motion to hold the United States and various officers of the IRS in contempt (80-1768);

3) grant of summary judgments in favor of individual defendants Feddor, Stevens, Hogan and Osborne, IRS agents, on plaintiffs Richard and Sally Dema's and Tabcor's claims under the Federal Tort Claims Act (FTCA) and the Fifth Amendment of the Constitution (80-2547, 81-1055); and

4) denial of Richard Dema's *pro se* motion to expunge the record of scurrilous remarks made by the district court judge (80-2592).

I.

These consolidated appeals involve an ongoing battle between the Department of Treasury and Richard and Sally Dema and Tabcor. Richard Dema is the President of Tabcor. Because of the ongoing nature of the dispute and its many sagas that relate to each individual appeal, the particular facts of each appeal will be recounted separately below.[1]

Appeal No. 79-1901

On July 6, 1978, Tabcor filed an action in the district court, under FOIA, seeking the release of a Department of Treasury document. The document at issue is a memo-

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[1] In a series of motions presented prior to oral argument, at oral argument, and thereafter, plaintiffs seek to stay these appeals because of bad faith and fraud by the Government and the alleged absence of appellate jurisdiction. We have examined the motions and conclude that we have appellate jurisdiction of these appeals and also find that fraud or bad faith does not require a stay or postponement or oral argument. Plaintiffs are free to pursue such claims in the district court. Therefore, we consider the following motions and rule as stated:

Tabcor-Demas' Motion for Leave to File Tabcor's Reply to Government's Answer (in the Form of a Motion to Strike) which Includes Defendant's Motion to Strike Tabcor's Third (Fourth) Petition for the Issuance of Rules to Show Cause is GRANTED.

Tabcor's Motion for Leave to File Government's Memorandum and Tabcor's Reply in Support of Tabcor's Motion to Strike and Plaintiff-Counter-Defendant's Motion to Reconsider Order of March 23, 1981 in support of Tabcor's Motion for a Stay of Proceedings Based on Unusual Development is GRANTED. Tabcor's Motion for a Stay of Proceedings Based on Unusual Developments is DENIED.

randum from Kirk Wade to Dale S. Collinson, dated May 19, 1976. In the letter disposing of Dema's administrative appeal the memorandum at issue is described as "an intra-agency memorandum which reflects the deliberative and policy-making processes of the Treasury Department."

The facts relevant to the generation of this memorandum are as follows. In 1976 there were proposals to modify the definition of the "employer-employee" relationship which would affect the payment of employment taxes. In May 1976 the Commissioner of Internal Revenue requested that Collinson, Tax Legislative Counsel for the Department of Treasury, analyze these various proposals. Collinson then asked Wade, an attorney-adviser in the Treasury Department, to write a memorandum reviewing and analyzing the proposals.

It is this memorandum that plaintiffs requested. The request was denied by the Treasury Department and this denial was affirmed at each step of the administrative review process. Thereafter, plaintiff filed this action under FOIA. The district court (Judge Marshall), on June 8, 1979, entered summary judgment on behalf of defendants, holding that the memorandum was privileged under 5 U.S.C. 552 (b)(5). *Tabcor Sales Clearing, Inc.* v. *Department of Treasury*, 471 F. Supp. 436 (N.D. Ill. 1979).

Appeal No. 80-1768

This appeal (as well as 80-2547, 80-2592, and 81-1055) arises out of an action filed in July 1975 by Tabcor for refund of employment taxes. Eventually, Tabcor prevailed in this refund action and obtained a judgment for $253.00. This judgment was entered on December 8, 1978. The judgment also dismissed the Government's counterclaim for taxes.

On February 8, 1980 Tabcor filed a "Motion for Issuance of Rules to Show Cause." The motion requested that rules to show cause be issued against nine IRS employees and ten Department of Justice employees. The motion stated that the judgment of December 8, 1978 was for the plaintiffs and dismissed the Government's counterclaim for taxes. The motion alleged that although no tax liability was owed, the Government had continued to place a lien on Tabcor's property for unpaid taxes. This was contrary to the prior judgment in Tabcor's favor and, according to the motion, required citations for contempt.

In response to this motion, the Government stated that the liens were placed because of an administrative error and was not a willful refusal to comply with the prior judgment. Also, the Government stated that the tax liens complained of were removed. In light of these circumstances the district court (Judge Bua) denied plaintiff's motion.

Appeals Nos. 80-2547 and 81-1055

This appeal is from a series of orders which dismissed the three counts of plaintiffs', Richard and Sally Dema and Tabcor, claim for damages against various named and unnamed IRS employees as well as against the United States.

In their original complaint plaintiffs alleged three separate counts for recovery. Count I itself apparently contains three separate legal theories. First, plaintiffs allege that defendants conducted an illegal tax investigation in violation of 26 U.S.C. § 7605(b). Second, it is alleged that defendant Feddor "thrust two IRS administrative summonses into the stomach of . . . Sally Dema, which caused her to suffer severe bodily harm, a miscarriage, and mental distress and loss of consortium. . . ." (R.,

Doc. 1 at 3. Finally, the third legal theory was that defendants conspired (through the illegal investigation) to deprive plaintiffs of their right to due process under the Fifth Amendment.

Count II realleged the facts concerning the illegal investigation and claimed that the actions were in violation of the Federal Tort Claims Act (FTCA). Also, plaintiffs claimed that the defendants negligently processed various tax forms which harmed plaintiffs.

Count III claimed that the corporate plaintiff, Tabcor, had to "expend large sums of money for attorney's fees and costs," and that these are recoverable under 42 U.S.C. § 1988.

Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and in the alternative for failure to state a cause of action. In addition, the individual defendants filed affidavits which described their duties with the IRS and averred that the investigation of Tabcor and the Demas "were undertaken in the normal course and scope of . . . duties and in good faith. . . ."

In an order entered April 30, 1979, Judge Flaum acted on defendant's motions. Judge Flaum dismissed that portion of Count I that relied on § 7605(b), holding that the statute did not create a private cause of action. The court reserved ruling on plaintiffs' constitutional claim under the Fifth Amendment until the Supreme Court decided *Davis* v. *Passman*, 571 F.2d 793 (5th Cir.), *cert. granted*, 439 U.S. 925 (1978) (whether cause of action for damages may be asserted under the Fifth Amendment).

As to Count II, Judge Flaum held that this count must be dismissed for failure to state a claim. Judge Flaum ruled that 28 U.S.C. § 2608(c), which bars any action for tortious conduct against the United States when the action

"arising in respect of the assessment or colletcion of any tax," precluded the claim in Count II.

Finally, Judge Flaum ruled that 42 U.S.C. § 1988 did not provide a substantive basis, for jurisdiction. Rather, it sought to provide attorney's fees to the party that prevails in the litigation of a particular action. Those circumstances being absent, Judge Flaum dismissed Count III.

Thereafter, the case was reassigned to Judge Shadur. Plaintiffs had filed a motion to reconsider Judge Flaum's order of April 30, 1979. In an order dated October 6, 1980 Judge Shadur denied plaintiffs' motion for reconsideration and also dismissed the remainder of Count I of plaintiffs' complaint. Judge Shadur held that the individual defendants were entitled to qualified immunity. Plaintiffs filed a notice of appeal from this judgment as well as a motion to reconsider, the denial of which led to the filing of Appeal No. 81-1055.

Appeal No. 80-2592

This appeal is from the denial of "Plaintiff's [Richard Dema] Motion to Reconsider and Expunge Certain Words" from Judge Shadur's order of October 6, 1980. Specifically, Dema sought to expunge the following comment from Judge Shadur's order.

> Here as elsewhere in the proceeding plaintiffs' counsel indulges in personal attacks on the integrity of opposing counsel. For example, plaintiffs' exhibits filed July 19, 1979 are replete with such charges. This Court will not, as it might well, act under the provisions of Fed. R. Civ. P. 11 with respect to such matters, but counsel for the plaintiffs is requested to proceed in future as called for by Rule 7-101(a)(1)(D) of the Illinois Code of Professional Responsibility.

R., Doc. 141 at 3, n.2. The grounds for the expunction of certain words were that they were immaterial, unfavorably reflected on the court's impartiality, and disrupted the effective representation of Dema by his lawyer. This motion was denied on October 28, 1980 and appeal No. 80-2592 followed.[2]

Appeal No. 81-1055

As will be recalled, plaintiffs filed a motion to reconsider the order of October 6, 1980 granting summary judgment to defendants. On November 20, 1980, Judge Shadur denied this motion. This appeal is from the denial of that motion.

II.

FOIA Claim — Appeal No. 79-1901

This appeal is from Judge Marshall's order granting summary judgment on the basis that the document requested was exempt from disclosure under 5 U.S.C. § 552 (b)(5), which exempts

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[2] The only appeal that properly challenges Judge Flaum's dismissal of Counts II and III and Judge Shadur's dismissal of Count I is the appeal No. 81-1055. Appeal No. 80-2547 was filed while a motion to reconsider was pending, and thus is void. Fed. R. App. P. 4(a)(4). This is of no significance, however, because the notice of appeal in 81-1055 covers all relevant orders.

We note that plaintiff's counsel apparently has the practice of filing protective notices of appeal and also filing motions to reconsider in the district court. We urge plaintiff's counsel to observe the rule requiring that only final judgments be appealed and Rule 4(a)(4) which renders a premature notice of appeal void for certain purposes. Filing of numerous (and unnecessary) notices of appeals causes confusion and wastes scarce court resources to determine the existence (or lack thereof) of appellate jurisdiction. Future failure to comply with the Federal Rules of Appellate Procedure may lead to dismissal.

> inter agency or intra agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

The exemption in (b)(5) may be restated as whether the documents sought would be available to the party if that party were in litigation with the agency, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Therefore, the various privileges which bar discovery of certain documents would likewise render the document exempt from disclosure under FOIA.

While the exact scope of the privileges incorporated in exemption 5 is unclear, it is beyond cavil that the exemption does include the principle of executive privilege. *Sears*, 421 U.S. at 150. The purpose of the executive privilege is "to protect the confidentiality of the predecisional deliberative process." *Jordan* v. *United States Department of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978).

The Senate Report describing the exemption states:

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writing were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were found to "operate in a fishbowl."

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (quoted in *Jordan*, 591 F.2d at 773). *See also* H. R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

The protection of the pre-decisional deliberation process seeks to further three separate interests. First, it allows for free and open discussion of policy alternatives among the agency officials which will lead to better decisions being made. *Mead Data Cent., Inc.* v. *United States Dept.*

of Air Force, 566 F.2d 242 (D.C. Cir. 1977). Second, it protects the premature disclosure of tentative and variant policy alternatives, thus preventing confusion as to what the particular agency policy is. *Grumman Aircraft Eng. Corp.* v. *Renegotiation Board,* 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds,* 421 U.S. 168 (1975). Finally, it prevents unfair criticisms of the decisionmaking process itself by ensuring that "officials should be judged by what they decide, not for the matters they properly considered before making up their minds." *Grumman Aircraft,* 482 F.2d at 718.

In light of these three salutary interests to be protected, it becomes clear that only those documents that make recommendations on policy or express opinions on policy matters are exempt under (b)(5). This follows from the fact that only when policy recommendations or opinions are expressed is there the possibility of infringing on the three interests identified.

The memorandum sought by plaintiffs clearly falls on the side of one which was used as part of the deliberative process in formulating Treasury Department policy on legislative proposals to change the definition of the "employer-employee" relationship for employment tax purposes. The author of the memorandum, Kirk Wade, was specifically told to analyze the various proposals. We have viewed the document *in camera* and are convinced that it is exempt under (b)(5). It analyzes the various proposals, gives opinions and ideas about the proposals, and makes several recommendations. Non-disclosure of this document was precisely what Congress had in mind when passing the exemption contained in (b)(5).

No. 80-1768 — Denial of Plaintiff's Motion for Contempt

Plaintiff appeals from the decision of the district court which refused to hold defendants in contempt. The

district court believed that the defendants' imposition of tax liens on plaintiffs' property after a decision holding no tax liability existed was not in bad faith but caused by an administrative error.

We believe that the district court's decision was correct. The use of contempt—either civil or criminal—is reserved for disobedience of court orders. 5 Moore's Federal Practice ¶ 38.33(1) at 256 (3d ed. 1980). Civil contempt is available at the instigation of a private litigant who has an interest in seeing that court orders are followed. Thus, the proceeding is remedial and for the benefit of the movant. *Gompers* v. *Buck's Stove and Range Company*, 221 U.S. 418, 441 (1911). A proceeding for criminal contempt is intended to be punitive and deter illegal conduct by setting an example for the public at large. *United States* v. *United Mine Workers*, 330 U.S. 258, 302 (1947).

Once the liens were lifted by the Government there was no need to hold anyone in civil contempt to compel that any act be done. Also, the district court acted fully within its discretion in refusing to find defendants in criminal contempt. The mistake apparently was inadvertent and did not require the serious punishment of contempt. Also, the district court alerted the defendants to the fact that they should ensure that such a mistake did not again occur; and if it did, sterner actions would have to be taken.

Appeals Nos. 80-2547 and 81-1055

These appeals are from a grant of summary judgment entered by Judge Shadur on plaintiffs' *Bivens* claim alleged under the Fifth Amendment and Judge Flaum's dismissal of Counts II and III of the complaint. As noted above, Judge Flaum had delayed disposition of this claim pending the Supreme Court's decision in *Davis* v.

Passman, 442 U.S. 228 (1979).[3] The case then was transferred to Judge Shadur.

Judge Shadur stated that while it was difficult to determine whether plaintiffs' allegations stated a deprivation of a constitutional right, even assuming the existence of a right, the defendants were entitled to qualified immunity under *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). *Scheuer* makes it clear that the defense of immunity is available when the defendants officers' actions have been taken in good faith with a reasonable belief in the constitutionality of their actions. Id. at 250. Defendants' affidavits all state that actions taken in the course of the investigation of Tabcor were consistent with IRS rules and regulations, undertaken in good faith and in the normal course of employment. Therefore, summary judgment was properly granted on plaintiffs alleged constitutional violations caused by the alleged illegal tax investigations.

Summary judgment also was proper as to the alleged assault by agent Feddor. Agent Feddor's affidavit states that

> all . . . actions which were undertaken by me in connection with the employment tax audit examination of Tabcor were undertaken in the normal course and scope of my duties as an employee of the Internal Revenue Service and were undertaken in good faith and in accordance with the rules and regulations of the Internal Revenue Service.

R. Doc. 49 at 4. The affidavit makes it clear that agent Feddor acted properly throughout the investigation and

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[3] It appears that under the analysis set out in *Cort* v. *Ash*, 422 U.S. 66 (1975), the district court's conclusion that § 7605(b) does not contain a private implied remedy is correct. *Dema* v. *Feddor*, 470 F. Supp. 152 (N.D. Ill. 1979).

Also, Judge Flaum's dismissal of plaintiffs' FTCA claim as being barred by 28 U.S.C. § 2680(c) was proper.

followed all IRS rules—presumably those which forbid assaults while serving subpoenas. Plaintiffs have offered nothing to controvert that agent Feddor acted properly throughout the investigation. Therefore, summary judgment was proper as to that claim.[4]

802592 — Appeal from Denial of Pro Se Motion

This is an appeal from Judge Shadur's order denying a motion to expunge certain comments about plaintiff's counsel from an order entered. The comments allude to the unprofessional nature of the actions of plaintiffs' counsel, Sheldon R. Waxman.

We have examined the record in this case and conclude that Judge Shadur's comments were not only appropriate, but indeed evinced a remarkable amount of self-restraint and propriety—something lacking in plaintiffs' counsel's behavior in this litigation. Judge Shadur's conclusions were well supported by the record and certainly within his power under Fed. R. Civ. P. 11. 2 Moore's Federal Practice ¶ 11.02 at 11-7.

The judgment of the district court is affirmed.

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[4] In earlier documents defendants contended that a claim for assault would be barred by the relevant Illinois statute of limitations. To be sure, if this were a claim for assault or battery under state law it would be barred by the two-year limit in Ill. Rev. Stat. ch. 83, § 15. However, in *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977), we held that in actions under § 1983 and *Bivens* claims the appropriate statute of limitations was not selected by attempts to analogize the constitutional action to its state law counterpart. We applied the five-year catchall limitation of Ill. Rev. Stat. ch. 83, § 16, rather than the two-year limitation to *Bivens* claim.

The defendants apparently contend that the two-year limit applies and therefore the claim is barred—the alleged assault occurred on February 11, 1974 and complaint was filed on August 22, 1977. However, *Beard* makes it clear that the five-year limit is to apply and therefore the statute of limitations would not bar plaintiffs' *Bivens* claim.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 3103

J. RICHARD DEMA, SALLY DEMA and TABCOR SALES CLEARING, INC., (Formerly TABCOR, INC.),
Plaintiffs,

v.

DAVID J. FEDDOR, SANDRA STEVENS, JEANNE HOGAN, ROBERT OSBORNE, UNITED STATES OF AMERICA and OTHERS UNKNOWN OR UNNAMED,
Defendants.

AFFIDAVIT OF SHELDON R. WAXMAN

I, SHELDON R. WAXMAN, having been duly sworn upon my oath, do hereby state as follows:

1. That I am the attorney for the Plaintiffs in the above referenced case;

2. On June 19, 1979, I caused to be mailed to Mildred L. Seidman the original of a letter with attachments, copies of which are attached hereto;

3. On June 21, 1979, I handed a copy of this letter and its attachments to Mr. John Miles, Trial Attorney, Tax Division, Department of Justice;

4. Mr. Miles knew on June 21, 1979, that the Affidavits filed on April 2, 1979 and upon which he relied in his Memorandum were false and, further, he knew on that date that Plaintiffs disputed the facts alleged in those Affidavits.

5. On April 19, 1979, I received a letter from Mr. Jerome Fink, formerly Chief, Northern Region, Tax Division, a copy of which is hereto attached, which forwarded the five Affidavits to me and advised that the Affidavits, all of which we never received before, were going to be filed in Court.

6. On April 18, 1979, in response to what I thought would be an unpermitted submission, which *was to be made* to the Court, I filed our "Objections" to the filing of said Affidavits, a copy of the "Objections" is attached.

7. In May, 1979, in inspecting the docket entries in this case, I came across a docket entry for April 5, 1979, which indicates that the five Affidavits had actually been filed on April 2, 1979; Mr. Fink's letter is a lie, as his statement that he was going to file the Affidavits was false in that they had already been filed. This was done as an attempt to improperly influence this Court's decision on the then pending Government's Motions to Dismiss. The Affidavits were improperly submitted to this Court on an *ex parte* basis and were unresponsive to anything then pending.

8. This Affidavit is made in support of the Plaintiffs' legal position that Summary Judgment in this case is inappropriate and in order to document this unlawful, covert acts, which are part of the continuing conspiracy in this case.

/s/ Sheldon R. Waxman
SHELDON R. WAXMAN

SUBSCRIBED and SWORN to
before me this 19th day
of July, 1979.
/s/ Christine Bushnell
Notary Public
(Notary Seal)

APPENDIX D

DEMA, et al. v. *FEDDOR, et al.*

NO. 77C-3103

AFFIDAVIT OF J. RICHARD DEMA

I, J. Richard Dema, having been duly sworn upon my oath do hereby state as follows:

1. That I am one of the Plaintiffs in the above—entitled case;

2. That the facts contained in Mr. Waxman's letter to Mildred Seidman, dated June 19, 1979, and in the attachments thereto, are true and correct;

3. The defendants, with the possible exception of Jeanne Hogan, are not acting and have not acted in good faith toward me, my wife, and Tabcor. If future evidence reveals that Ms. Hogan was acting in good faith, I will dismiss her as a defendant to this law suit;

4. The 5 affidavits filed on April 2, 1979, by counsel for the defendants are false in many respects.

/s/ J. Richard Dema
J. Richard Dema

Subscribed and sworn to before
me this 19th day of July 1979.
/s/ Christine Bushnell
Notary Public
(Notary Seal)

APPENDIX E

PETITION FOR EN BANC HEARING

I.

The bad faith of the Defendants in this case was first recorded by this Court in the divided opinion in *U.S. and David J. Feddor* v. *Dema,* 544 F.2d 1373 (7th Cir., 1976) (Judge Markey in dissent), *cert. denied,* 429 U.S. 1093. These taxpayers should not be required to file yet another suit, as suggested in footnote 2 of the Opinion of July 21, 1981.

II.

The Record of the bad faith in this case requires the Court to order a *Rehearing En Banc* so that a reversal of the panel's opinion will create a full display of the facts to document the many acts of bad faith committed by Defendants. It is for this purpose that trials are normally permitted. Plaintiffs here were "waylaid" on their way to Court and a trial has not been permitted to them.

III.

The statements in Plaintiffs' Briefs in these various appeals require a conclusion different than that reached by the panel, whose failure to address the clear substantive issues raised by Plaintiffs is evidenced by the Opinion's failure to discuss any substantive issues, except Executive Privilege and Immunity, basing its determination on stale Supreme Court authority. Plaintiffs never raised (nor did Defendants address) any "statute of limitations" issue and, therefore, footnote 4 was totally spontaneous and unnecessary, as if to create a small victory for the taxpayers.

IV.

Furthermore, the Record in this case does not justify the continuing attack on Plaintiffs' counsel without allowing him a hearing. The Opinion appears to advocate that

American counsel should use less than the zealous advocacy required by the Ethical and Constitutional standards imposed on lawyers by the Courts. Therefore, the full Court should *especially* review this aspect of the Opinion. A simultaneous Petition for *En Banc* Rehearing has been filed in related Appeal Nos. 80-1138, 1205 and 1982 (separate Opinion filed on July 21, 1981). This attack on counsel is a false issue which attempts to "drive a wedge" between a client and his attorney.

V.

Specifically, an itemization of Error, based on the Record, is provided. That itemization, as follows, is not exhaustive:

A. The Court stated that "Plaintiffs have offered nothing to controvert that agent Feddor acted properly throughout the investigation. Therefore, summary judgment was proper as to that claim (ft. nt. 4)." The *facts* in the Record on Appeal are:

(1) At oral argument on June 15, 1981, counsel advised the Court that the depositions had been taken from the Court file below. The depositions clearly indicate that the Defendants were acting in bad faith.

(2) Plaintiffs' Brief advised the Court that counter-affidavits were filed stating that all of Feddor's five false affidavits contradicted each other and that they were perjurious. His testimony in the summons enforcement proceeding and at the twice terminated depositions clearly reveal Feddor's total lack of credibility.

(3) Judge Will "struck" one of Feddor's prior affidavits. This was in the Record.

(4) Judge Marovitz found that Feddor was an unreliable witness and that he had acted improperly against the Plaintiffs. These uncontroverted findings are part of

the Record in these Appeals. Without Feddor's affidavit, neither Judge Shadur's nor this Court's Opinions have any factual foundation. On remand, Judge Marovitz dismissed the Defendants' summons enforcement "with prejudice".

(5) Plaintiffs' request for a stay of proceedings was related to the underyling falsity of many of the documents filed in these cases, including the various affidavits. We did not think the Court wished to adjudicate matters based on documents we knew were false.

(6) The Court did not recite that the Government's counterclaim and underlying assessment report totalled $410,000.00, which are further evidence of Feddor's bad faith, nor that the judgment of December 8, 1978 provided a "reservation" on the issue of attorneys fees.

B. The Opinion did not resolve Judge Flaum's *Davis* v. *Passman* ruling. See, 470 F. Supp. 152 (N.D. Ill. 1979).

C. Qualified immunity cannot be determined by summary judgment when the issue of the credibility of the witnesses has been asserted, as here. Nor can there be a trial by affidavit because the mixed fact and law issue involves a "state of mind". Furthermore, shoving a summons into someone's wife's stomach (at home after working hours) causing physical harm can hardly qualify as a good faith act. It appears to be an act for which the Federal Tort Claims Act was made law. The fact that an IRS agent did the act should not be a reason to immunize government employees and to foreclose injured parties a remedy in the Federal Courts.

Respectfully submitted,

PLAINTIFFS-APPELLANTS
By: */s/ Shelly Waxman*
SHELLY WAXMAN
Their Attorney

CERTIFICATE OF SERVICE

TO: John F. Murray, Acting
Asst. Attorney General
U. S. Department of Justice
Tax Division
Washington, D.C. 20530
Attn: Michael L. Paup,
Chief, Appellate Section

I, SHELLY WAXMAN, hereby certify that a copy of the foregoing Petition for *En Banc* Rehearing was mailed to the above-named individual at his respective address, with postage prepaid, on August 4, 1981.

/s/ Shelly Waxman
SHELLY WAXMAN

SHELLY WAXMAN & ASSOCIATES
30 West Washington Street
Suite 1115
Chicago, Illinois 60602
(312) 782-1360

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 1283

UNITED STATES OF AMERICA and DAVID J. FEDDOR, Internal Revenue Agent, Internal Revenue Service,

Petitioners,

v.

J. RICHARD DEMA,

Respondent.

MOTION FOR ISSUANCE OF ORDER TO SHOW CAUSE AND FOR A CONTEMPT JUDGMENT

Now comes J. Richard Dema, as President of Tabcor, Inc., and individually, Respondent and shows to the Court as follows:

On February 7, 1975, this Court entered a final Judgment Order ruling from the bench essentially enjoining the Internal Revenue Service ("I.R.S.") through its Agent, David Feddor, from any further inspection of Tabcor, Inc.'s books and records for 1970, 1971. The ruling resulted from a Hearing where several witnesses testified on the issue of whether Tabcor, Inc. should have to produce certain books and records for inspection by the I.R.S. a second or third time. The Court's ruling permitted a limited inspection of said books and records of Tabcor, Inc. for the years 1972 and 1973. Said inspection and examination of Tabcor, Inc.'s books and records has been

completed as evidenced by Exhibit A which has been attached hereto.

During the course of the Hearing, an Internal Revenue Service Summons issued against J. Richard and Sally Dema requesting all their books and records for the years 1970, 1971 and 1972 was quashed pursuant to oral motion by counsel for Tabcor. Furthermore, on February 7, 1975, Internal Revenue Service Agent David Feddor, as evidenced by Exhibit B, stated he had no need for the personal books and records of J. Richard and Sally Dema. (Exhibit B, pages 63-64).*

The Internal Revenue Service, by its agents and through its attorney, Michael Stevenson were fully aware of the nature and scope of these proceedings. Counsel did not press for further relief, nor did counsel appeal, since Tabcor and J. Richard Dema believed only a limited examination would be permitted, and no further action would be initiated by the I.R.S. to force J. Richard and Sally Dema to produce their personal books and records, or for that matter the corporation's books and records, a fourth time.

David Feddor and his supervisor, William Rohter, have failed and refused to comply with the Court's prior rulings. They have essentially disobeyed and disregarded the provisions of said Order of District Judge Abraham L. Marovitz by the following acts and conduct:

1. On or about April 8, 1975, J. Richard Dema and Sally Dema were notified of a deficiency in their personal income tax return for the year 1970. Said deficiency aside from having absolutely no merit involves the production of the books and records of Tabcor, Inc. going back to 1967.

---

* Attached for the Court's convenience are certain portions of the transcript or the February 7, 1975 Hearing. Thereafter references to the transcript will be style "Exhibit B, page ----").

2. The I.R.S. is attempting to circumvent the Order of this Court, by issuing a deficiency as to J. Richard and Sally Dema, for what may be a taxable year not barred by the statute of limitations (year ending December 31, 1971) in order to inspect the books and records of Tabcor for its taxable year (ending January 31, 1971) *which is now barred by the statute of limitations.* The Internal Revenue Service over the last several weeks on at least four occasions have demanded additional books and records of both J. Richard and Sally Dema, as well as from Tabcor in order to have this deficiency notice withdrawn. No compromise agreement could be reached with Feddor or Rohter. It appears the I.R.S. wants full access to Tabcor's books and records without restriction.

3. In effect the Internal Revenue Service, by its Agents, Feddor and Rohter are attempting to circumvent and otherwise bypass a standing Court Order restricting access to Tabcor's books and records and J. Richard and Sally Dema's personal books and records (Exhibit B, pages 53-54 and 63-64). Should the I.R.S. be given these documents the prior Court Order will be rendered absolutely worthless and a total nullity. Such is not the intent or purpose of this Court's Order of February 7, 1975.

4. J. Richard Dema fears that without this Court's supervision the I.R.S., and especially Agent Feddor, are seeking additional documents solely to harass J. Richard Dema. Prior actions have proven this to be a fact. Just as outlandish assessments resulted from the access to books and records of Tabcor, Inc., so may abusive assessments result from any further production of documents. Agent Feddor has previously lied to J. Richard Dema as to his "purpose" and "need" to see books and records. See in particular the contradictions in Agent Feddor's testimony at pages 12-13 and 43 of Exhibit B. This Court

has stated to J. Richard Dema, President of Tabcor, Inc. that this Court desired to "keep control over the" production of specific books and records. Counsel for Tabcor believes that the actions of Agent Feddor evidence his bad faith (Exhibit B, at pages 53-54).

WHEREFORE, Respondent moves the Court for an Order requiring the Internal Revenue Service's ıployees David Feddor and William Rohter to answer and show cause why they should not be adjudged in contempt of this Court, and, upon return of said Order, to adjudge David Feddor and William Rohter in contempt of this Court for having violated and disregarded the terms of Judge Abraham L. Marovitz's Order of February 7, 1975, and to order said Internal Revenue Service Agents and Employees to purge themselves of said contempt by the withdrawal of said deficiency notice.

.....

Joseph H. Spiegel, Attorney for Respondent

Of Counsel:
Shefsky, Saitlin & Froelich, Ltd.
Six North Michigan Avenue
Suite 1600
Chicago, Illinois 60602
726-7900

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 2401

TABCOR SALES CLEARING, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICAN, et al.,

Defendants.

PLAINTIFF'S MOTION FOR ISSUANCE OF RULES TO SHOW CAUSE

NOW COMES Plaintiff, by and through its attorney, SHELLY WAXMAN, and moves for issuance of rules to show cause directed to the following agents or past agents of the defendant, United States of America:

IRS	*Dept. of Justice*
John H. Menzel	M. Carr Ferguson
Charles F. Miriani	John S. Miles
Stuart E. Seigel	Thomas P. Sullivan
Lester Stein	Myron C. Baum
D.L. Morgan	John F. Murray
Roy D. Clark	Jerome Fink
J.C. Domke	D. Patrick Mullarkey
R. DerAvedisian	T. B. Scullen
	Narda Cisco
	Richard Birchall

These Rules should be issued and made returnable before this Court on a date certain for the following reasons:

1. On December 8, 1978, this Court entered judgment for tax refund on behalf of the plaintiff. The amount

of the refund was for an amount equal to that paid to one employee for each "quarter" involved in the controversy; i.e., $253.00 plus interest. See, Ex. A.

2. This Court dismissed defendants' counter-claim which was for an amount which represented the total amount in controversy for the periods involved. This amount totalled $410,445.20.

3. The periods of time involved in this controversy were for 1970 through and including 1973. Because of the aforesaid judgment, all assessments for the periods involved should have been abated.

4. On January 7, 1980, the IRS unlawfully placed a lien for $88,077.66 for the years 1972 and 1973 for form 941 (withholding) taxes. See, Ex. B. This was for two of the four years in controversy adjudicated in favor of plaintiff by this Court's judgment order of December 8, 1978.

5. The aforesaid Notice of Lien was filed after one and a half years of plaintiff's attempt to obtain satisfaction of its judgment and the release of unlawful liens. See, Group Ex. C. However, instead of obtaining a release of liens filed in 1974, 1975 and 1976, which were declared unlawful by this Court's judgment order, the IRS has placed new and additional liens on plaintiff's property, as an act of further harassment.

6. This Court is familiar with plaintiff's allegations in *Dema, et al.* v. *Feddor, et al.*, No. 77 C 3103 now pending before Judge Flaum and Magistrate Sussman because it once pended before this Court. This Court's judgment order of December 8, 1978 did not put an end to the IRS harassment of plaintiff.

7. Plaintiff submits that it is necessary for this Court to utilize its ancillary jurisdiction to effectuate its orders.

This Court and plaintiff are entitled to an explanation of why this harassment continues. Furthermore, plaintiff is entitled to obtain monetary and other sanctions for the post-judgment conduct of the defendant in order to rectify the damage and to obtain, once and for all, an end to the harassment.

8. Since plaintiff is unable to apportion responsibility for the conduct of the defendant, it is appropriate for the Court to issue Rules to all of the individuals aforenamed in order to determine what is at fault for this egregious disregard of an order of a District Court of the United States of America.

WHEREFORE, plaintiff requests the issuance of Rules returnable on a date certain.

Respectfully submitted,

TABCOR SALES CLEARING, INC.
By: /s/ *Shelly Waxman*
SHELLY WAXMAN

SHELLY WAXMAN & ASSOCIATES
30 W. Washington St.
Suite 1115
Chicago, Illinois 60604
(312) 782-1360

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 3103

J. RICHARD DEMA, SALLY DEMA, and TABCOR SALES CLEARING, INC.,

Plaintiffs,

v.

DAVID J. FEDDOR, SANDRA STEVENS, JEANNE HOGAN, ROBERT OSBORNE, UNITED STATES OF AMERICA and others unknown or unnamed,

Defendants.

Received March 6, 1978
H. Stuart Cunningham, Clerk
United States District Court

PLAINTIFFS' AMENDMENT TO THEIR COMPLAINT

NOW COME PLAINTIFFS, J. RICHARD DEMA, et. al., and provide the following jurisdictional provisions in addition to those previously stated in their Complaint:

1. Title 28 U.S.C. Sec. 1340;

2. Title 28 U.S.C. Sec. 2410;

3. Title 5 U.S.C. Sec. 501 *et seq.* (The Administrative Procedure Act);

AMENDMENT TO PARAGRAPH 4
OF THE COMPLAINT

The following language is to be added after "tax" on the last line of paragraph 4: "The illegal tax investigation,

in addition to violating Title 26 U.S.C. Sec. 7605(b), involved a plan whereby governmental agents would use extortionate practices in order to compel corporate entities to join the FICA rolls in order to attempt to bolster a bankrupt Social Security Administration."

Respectfully submitted,
/s/ Sheldon Waxman
SHELDON WAXMAN

30 W. Washington St., Suite 915
Chicago, Illinois 60602

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 3103

J. RICHARD DEMA, et al.,

Plaintiffs,

v.

DAVID J. FEDDOR, et al.,

Defendants.

Received February 6, 1980
H. Stuart Cunningham, Clerk
United States District Court

PLAINTIFFS' SECOND AMENDMENT
TO THEIR COMPLAINT

NOW COME Plaintiffs, by and through their attorney, SHELLY WAXMAN, and provide the following additional

allegation at the end of paragraph 7 of COUNT I of the Complaint:

"The aforesaid illegal investigation is a continuing one." (See Group Exhibit C attached hereto and submitted herewith).

Respectfully submitted,
PLAINTIFFS
By: */s/ Shelly Waxman*
SHELLY WAXMAN

SHELLY WAXMAN & ASSOCIATES
30 W. Washington Street
Suite 1115
Chicago, Illinois 60602
(312) 782-1360

APPENDIX J

U.S. DEPARTMENT OF JUSTICE
Office of the Associate Attorney General
Washington, D.C. 20530

January 29, 1981

Sheldon R. Waxman, Esquire
Shelly Waxman & Associates
Suite 915
30 West Washington Street
Chicago, Illinois 60602

Re: Appeal No. 9-2329
QJS:PLH:FTN

Dear Mr. Waxman:

You appealed on behalf of your client, Tabcor Sales Clearing, Inc., from the partial denial by Gerald A. Feffer, Deputy Assistant Attorney General, Tax Division, on the request by Tabcor for records pertaining to itself.

As you were informed by Florence Nakakuni of my staff, by telephone on January 27, 1981, the files containing the records maintained by the Division on your client have been misplaced. Diligent searches have failed to locate these files. If they are located in the future, they will be reviewed and an administrative appellate action will be taken.

Sincerely,

Robert N. Ford
Acting Associate Attorney General

By: */s/ Quinlan J. Shea*
Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

APPENDIX K

Law Offices
SHELLY WAXMAN & ASSOCIATES
Suite 1115
30 West Washington Street
Chicago, Illinois 60602

782-1360
Area Code 312
November 18, 1981

H. Stuart Cunningham
Clerk of the United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Re: Dema/Tabcor Cases
NOS. 75C2401 77C3103 78C3992 78C2673

Dear Mr. Cunningham:

We have requested Mr. Strubbe to certify the record in the below referenced appeals. The certification we received

dated October 30, 1981 does not provide the full record of the above listed cases. For some unexplained reason, these records were returned to you prior to certification, although we had requested their transmittal to the U.S. Supreme Court. As you know, highly sensitive sealed *in camera* documents are involved.

Please forward the complete records to Mr. Strubbe so that he can make an immediate supplemental certification.

FL,
/s/ Shelly Waxman
Shelly Waxman

cc: Thomas Strubbe
Re: Appeal Nos. 80-1138 80-1205 80-1982 80-1901 80-1768 80-20547 80-2592 and 81-1055.
Clerk of the U.S. Supreme Court
J.R. Dema
(Certified Return receipt requested)

APPENDIX L

Law Offices
SHELLY WAXMAN & ASSOCIATES
Suite 1115
30 West Washington Street
Chicago, Illinois 60602

782-1360
Area Code 312
November 18, 1981

Mr. Thomas Strubbe
Clerk of the U.S. Court of Appeals
for the 7th Circuit
219 South Dearborn
Chicago, Illinois 60604

Re: Dema/Tabcor Appeal Nos. 80-1138 80-1205 80-1982 79-1901 80-1768 80-20547, 80-2592 & 81-1055

Dear Mr. Strubbe:

The certification we received in Appeal Nos. 80-2547, 80-2592, 81-1055 were only some of the records we wish to be transmitted to the United States Supreme Court. We do not understand the difficulties that are being caused over this relatively simple matter. This is now the third letter we have sent.

Furthermore, it is obvious that not all of the record has been certified. The *in camera* documents, motions and the post mandate filings have not been included. We can't understand this as they were all filed by order of court. Please do what you can to take control of this matter so that the complete record is transmitted to the Clerk of the United States Supreme Court. It is not enough to state that you do what "they" tell you to do.

FL,

/s/ *Shelly Waxman*
Shelly Waxman

cc: Clerk of the U.S. Supreme Court
J.R. Dema

(Certified return receipt requested)

Opposition

Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-979

In the Supreme Court of the United States

OCTOBER TERM, 1981

TABCOR SALES CLEARING, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-979

TABCOR SALES CLEARING, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In this Freedom of Information Act suit and damage action brought by petitioners against the United States and certain Internal Revenue Service employees, petitioners contend: (1) that the resolution of the question of the federal employees' immunity from the damage suit by summary judgment was improper; (2) that their allegations of an "outlaw" tax investigation entitled them to a trial of their tort claims against the United States and the individual defendants; and (3) that the document sought in their Freedom of Information Act suit was improperly held exempt from compulsory production in light of their allegations of governmental misconduct.

The relevant facts may be summarized as follows: The two actions, commenced in the United States District Court for the Northern District of Illinois, have a common origin in an investigation by the Internal Revenue Service into the employment tax liability of petitioner Tabcor Sales Clearing, Inc.[1] That investigation culminated in an assessment of additional employment taxes against Tabcor. The Freedom of Information Act suit arose out of petitioners' request that the Department of the Treasury turn over an internal memorandum, prepared by a staff attorney for the Treasury's Tax Legislative Counsel, analyzing proposed legislation concerning the employment tax provisions of the Internal Revenue Code of 1954. After an in camera inspection, the district court held that the memorandum was exempt from compulsory disclosure by the deliberative privilege under 5 U.S.C. 552(b)(5), and, accordingly, granted summary judgment for the government (Pet. App. 2-3).

In the damage action, petitioners filed a complaint against the United States and certain Internal Revenue Service employees, alleging, in pertinent part, that the individual defendants had participated in an illegal tax investigation[2] into Tabcor's liability for federal employment taxes, thereby depriving petitioners of their Fifth Amendment rights. Jurisdiction for the claim against the United States was premised on the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*) (Pet. App. 4-5). The action against the

---

[1]Petitioner J. Richard Dema is Tabcor's president; petitioner Sally Dema is his wife (Pet. App. 2).

[2]In support of their claim that the investigation was "illegal," petitioners alleged that it was commenced in violation of Section 7605(b) of the Internal Revenue Code of 1954 (26 U.S.C.); that they were caused mental anguish and economic loss; and that one of the defendants struck Mrs. Dema while serving an administrative summons in the course of the investigation (Pet. App. 4-5).

individual defendants was based upon this Court's decision in *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Pet. App. 12 & n.4).

The district court held that the claim against the United States was barred by 28 U.S.C. 2680(c), which provides that the relief permitted by the Federal Tort Claims Act does not extend to suits "arising in respect of the assessment or collection of any tax." After dismissing the claim against the United States, the court ruled that the uncontradicted affidavits filed by the individual defendants established that they had participated in the investigation in good faith, and were thus immune from suit under the doctrine of qualified immunity established by *Butz* v. *Economou*, 438 U.S. 478, 507-517 (1978) (Pet. App. 5-6). Accordingly, it entered summary judgment in favor of those defendants. The court of appeals affirmed in both cases[3] (Pet. App. 7-9, 10-12).

1. Petitioners claim (Pet. 5) that summary judgment was an inappropriate manner of disposing of their damage action against individual employees of the Internal Revenue

---

[3]The court of appeals also consolidated a further appeal by petitioners from an order in a related refund suit denying their request to hold the United States and various officials of the Internal Revenue Service in contempt and an appeal by Richard Dema from an order in the damage action denying his request to expunge the record of remarks made by the district court concerning the conduct of petitioners' counsel in that action (Pet. App. 1-2). The court of appeals also affirmed both of those orders (Pet. App. 9-10, 12).

While this petition includes the subsequent appeals in its caption, it does not present any question as to the correctness of the lower court's resolution of those appeals. Petitioners J. Richard Dema and Sally Dema have filed a separate petition (No. 81-981), with respect to the denial of relief in a related Freedom of Information Act suit in which they sought the production of memoranda prepared by officials of the Internal Revenue Service in connection with petitioner's administrative tort claim. In that petition (at 5-6), petitioners object to the district court's comments concerning the conduct of their counsel in that case.

Service. This Court held, however, in *Butz* v. *Economou, supra,* that government employees are entitled to at least a qualified immunity under which they are immune from damage suits as long as their actions were taken in good faith and with a reasonable belief in their legality. Moreover, the Court expressly approved the use of summary judgments in such cases, stating that (438 U.S. at 508):

> * * * damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. * * * In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harrassed by frivolous lawsuits.

Petitioners did not establish the existence of a material factual dispute between the parties on the issue of the defendants' good faith in pursuing the investigation. Indeed, the affidavits, submitted with the government's motion for summary judgment, affirmatively established the defendants' good faith. Petitioners' conclusory allegations that the defendants lied in their affidavits and were not proceeding in good faith (see, *e.g.*, Pet. App. 13-15) were insufficient to require a further factual inquiry. Summary judgment for the defendants was therefore entirely appropriate.

2. Contrary to petitioners' further contention (Pet. 5), nothing in this Court's decision in *Carlson* v. *Green,* 446 U.S. 14 (1980), demonstrates error in either the district court's dismissal of the damage action against the United States or its entry of summary judgment for the individual defendants. In *Carlson* v. *Green, supra,* the Court held that the mere existence of a statutory cause of action against the United States under Section 2680(h) of the Federal Tort

Claims Act did not preclude a *Bivens*-type damage suit against individual federal prison officials for alleged violations of Eighth Amendment rights. Here, however, petitioners' Federal Tort Claims Act suit against the United States is specifically barred by 28 U.S.C. 2680(c). Moreover, nothing in *Carlson* v. *Green*, suggests that the plaintiffs in a *Bivens* action are entitled to a trial in the absence of the existence of a material factual dispute. See *Butz* v. *Economou, supra*, 438 U.S. at 507-508.

3. Finally, petitioners contend (Pet. 6) that the court below erred in holding that the Treasury Department memorandum they sought is protected from compulsory disclosure under the Freedom of Information Act by 5 U.S.C. 552(b)(5). But this Court has held on numerous occasions that Section 552(b)(5)—which exempts from disclosure under that Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"—was intended to make the so-called "executive" or "deliberative" privilege available to the government in the case of requests under the Act. See, *e.g.*, *Federal Open Market Committee of the Federal Reserve System* v. *Merrill*, 443 U.S. 340 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *EPA* v. *Mink*, 410 U.S. 73 (1973). Both the district court and the court of appeals examined in camera the memorandum in question—which was written by an attorney-advisor for the Treasury Department in contemplation of proposed amendments to the Internal Revenue Code—and properly concluded that it was precisely the

type of information that Section 552(b)(5) was intended to protect[4] (see Pet. App. 7-8). Cf. *Pies* v. *IRS*, No. 79-2303 (D.C. Cir. Nov. 6, 1981). Moreover, since Congress was plainly under no constitutional compulsion, in the first instance, to provide for the type of relief permitted under the Freedom of Information Act, there is no basis for petitioners' suggestion (Pet. 6) that Section 552(b)(5) is itself unconstitutional insofar as it permits such a claim of privilege to be asserted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1982

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[4]Contrary to petitioners' contention (Pet. 6), the decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (D.C. Cir. 1979), aff'd by an equally divided Court, No. 79-880 (June 22, 1981), does not stand for the proposition that the executive or deliberative privilege is not available in Freedom of Information Act suits where the plaintiffs have alleged governmental misconduct. Insofar as it is relevant here, that decision held (606 F. 2d at 1210-1213) that there is no executive privilege that confers upon the President absolute immunity from a damage action by private individuals for alleged violations of constitutional and statutory rights.

Petitioner's Reply Brief

Nos. 81-979 and 81-981

Office - Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

TABCOR SALES CLEARING, INC. and J. RICHARD and SALLY DEMA,
Petitioners,

vs.

UNITED STATES OF AMERICA and DAVID J. FEDDOR, et al.,
Respondents,

TABCOR SALES CLEARING, INC.,
Petitioner,

vs.

DEPARTMENT OF THE TREASURY,
Respondent.

RICHARD DEMA and SALLY DEMA,
Petitioners,

vs.

INTERNAL REVENUE SERVICE,
Respondent.

REPLY BRIEFS AND SUPPLEMENTAL APPENDIX ON CERTIORARI

Tabcor Sales Clearing, Inc.,
J. Richard Dema and Sally Dema
By SHELDON R. WAXMAN,
one of their attorneys

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In the
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TABCOR SALES CLEARING, INC. and J. RICHARD and SALLY DEMA,
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vs.

UNITED STATES OF AMERICA and DAVID J. FEDDOR, et al.,
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TABCOR SALES CLEARING, INC.,
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vs.

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RICHARD DEMA and SALLY DEMA,
Petitioners,

vs.

INTERNAL REVENUE SERVICE,
Respondent.

REPLY BRIEFS AND SUPPLEMENTAL APPENDIX ON CERTIORARI

I.
81-979

Petitioners wish to make a few obvious and a few not so obvious points newly raised by the Solicitor's Opposition.

It is noteworthy that neither Judge Markey's dissent[1] nor Judge Flaum's decision are mentioned. Furthermore, the *Davis* v. *Passman* conflict stated in Judge Flaum's decision has never been resolved.[2]

There are three cases listed in the caption to the *certiorari* petition. The Solicitor mistakenly states that there are only two. Furthermore, the Solicitor's "issues" are not the Petitioner's issues.

Moreover, the (b) (5) exclusion applies only to a privilege known to federal common law, which would be available to the agency in "headon" litigation. Neither *Fed. Open Reserve, E.P.A.*, nor the *NLRB* cases are applicable because this principle was not articulated to the court in those cases.

Furthermore, we expected some comment regarding our pending motions (to consolidate and to order the 7th Circuit to supplement the Record on Appeal and certify it to this Court).[3]

Specifically: at *page 2* (of Govt's Opposition hereafter "Go"):

---

[1] The majority only held that Section 7421 was a legal bar. They did not resolve the bad faith issue. On remand, Judge Marovitz dismissed the government's summons enforcement *with* prejudice and no further appeal was taken by the Government.

[2] The case was taken away from Judge Flaum by the Clerk and given to Judge Shadur before Judge Flaum could act on the timely reconsideration request. Therefore, Shadur was improperly given the task of interpreting another Judge's opinion. Judge Shadur should have known better than to have allowed this transfer and, clearly, should have deferred to Judge Flaum.

[3] We were particularly interested in assuring that the *in camera* documents were seen by this Court prior to its conference. See Supplemental Appendix for a letter dated December 24, 1981 from Chief Deputy Clerk Francis J. Lorson and Shelly Waxman's letter in response dated January 8, 1982.

1. What the Solicitor calls an "investigation" we call the "Independent Contractor Plan."[4] The Solicitor's "additional employment taxes" is merely a "cover" for the unlawful activity.

2. The depositions indicate that there were "special" schools, "special" handling, and "special" procedures. Therefore, there was more involved here than merely a *7605* (b) infraction.

3. The revenue agent's "strike" (the thrusting of an IRS summons into her stomach) on Mrs. Dema caused a spontaneous miscarriage, as revealed by hospital records, available to, but never requested by, the government, during "discovery".

At *page 4* of Go:

1. We're talking about an intentional battery on Mrs. Dema. That, certainly, is a disputed fact. The agent claims a *belief* that he acted in good faith. We claim he was not. The Solicitor has not even attached a copy of any of the 5 court affidavits filed on behalf of this IRS Agent, one of these was the *only* document utilized by the lower Courts in order to assert an "uncontradicted" assumption in affirming the summary decisions. We "told" the 7th Circuit at the recorded oral argument that the depositions had been taken from the Court Record and that the panel was acting on an incomplete Record. The Record shows:

(1) Judge Will struck one of Feddor's 5 perjurious affidavits on our Motion;

(2) Feddor's testimony is in conflict with his affidavit—specifically his testimony in the summons enforce ment contempt proceeding is contrary;

---

[4] A District Court in Texas recently in attorneys fees hearings has noted the IRS excesses in this area. The government did not appeal the large award, confirming an admission of improper and bad faith conduct.

(3) The facts in the Record of the tax court case indicate the falsity of the affidavit;

(4) Feddor's deposition contraverts his affidavit;

(5) Sandra Stevens' deposition states that Feddor could not have been out on an employment tax case;

(6) Reviewer Osborne's deposition contraverts Feddor's affidavits;

(7) The transcripts of account and Feddor's own daily work sheets contravert his affidavits;

(8) Dema, under oath, contraverts Feddor's affidavits and so do the hospital records of Mrs. Dema spontaneous miscarriage.

2. The Solicitor says that our allegations were "insufficient to require a further factual inquiry." That's what trials are for—the orderly introduction of evidence.

At *page 5* of Go:

1. We requested the Government to elect between a *Bivens* count and a FTCA count. We had assumed one or the other would suffice and we were willing to go to a bench trial. Instead, under these *gross* facts, the Government has repeatedly contested jurisdiction under *any* theory. Later (after Judge Flaum's decision) the Government converted the lack of jurisdiction argument into an ingenuous claim of absolute immunity, by using qualified immunity as a sham to cover a summary judgment request, which would deny Petitioners their "day in court." Since an IRS agent is an agent of the President, there is little difference between what occurred here and what occurred in *Halperin*. The "defense" here has been more sophisticated than an outright claim of absolute immunity.[5]

---

[5] We remind the Court that this is still an "open" issue as *Nixon* v. *Fitzgerald*, No. 79-880 and *Harlow* v. *Fitzgerald*, 80-945, are still before the Court.

2. In the Treasury Department case, we contested that the *in camera* document was written by an "attorney-advisor". Judge Marshall refused to rule on the Government's claim of attorney client privilege.

At *page 6* of Go:

1. We made no claim that Section 552(b)(5) was unconstitutional. We said that there is no federal "common law" privilege such as "deliberative," "executive" or "governmental" privilege. Therefore no 552(b)(5) claim can be made since 552(b)(5) depends on a legitimate federal privilege. We contend that the Constitution did not authorize such a privilege and that it, therefore, does not exist. *Halperin* holds the same way.

2. At *ft. nt 4* of Go—A double negative is stated. *Halperin* is exactly *in point*. The IRS agent here claims a greater immunity than FBI agents. Qualified immunity is a sham without a trial—jury or bench. The 2680(c) issue is a fact issue to be determined at trial. The IRS investigation of the SF95 claim is part of the *in camera* documents involved in Petition Docket No. 81-981. Since the Government refused to make an election, *Carlson* v. *Green* controls.

II.

81-981

Work product privilege was claimed and sustained, although we claimed the criminal fraud exception to that privilege. The court also refused a trial on this bad faith issue and proceeded summarily.[6]

---

[6] We asked for a trial on the "conclusory allegations." In 81-979 the Go called it "uncontradicted" evidence.

The "existence" of documents[7] was indicated only after the *entry* of an *in camera* inspection order. At that time all of the documents requested in the FOIA application which preceded the lawsuit were given to Judge Kirkland and the Demas received some of those.

Furthermore, on the attorneys fees issue, the government's feeble attempt to bolster the irrational behavior of the trial judge to a level of reason is totally inadequate. Fees were not denied, according to his "decisions," because of *Blue* or the other "authority".[8] The Government here denies that the Demas "substantially prevailed." This "flies in the face" of the admitted fact in the Record that we received 100% of what we asked for and not a small part of what we requested, as implied by the Solicitor. Furthermore, the revelation of an unlawful IRS plan which affected many American businesses can hardly be considered a private interest pursuit which could invoke the *Blue* "rule".[9]

The Solicitor admits that the trial Judge's summary conduct went beyond the bounds of summary authority. Contempt is a chargeable offense. Charges, however, would require a hearing. Furthermore, the trial court's conduct did not amount to punishment to the attorney—only to the denial of attorneys fees which would have been awarded to the client. Indeed this is onerous and cowardly conduct. The Solicitor appears unaware of the power of the litigation bar to deal with such repeated conduct.

---

[7] We contend the handwritten notes were by the attorney, James Littlefield, who was also handling the "refund" case. This, by itself, under the circumstances raises serious questions about the propriety of the IRS claims handling procedure.

[8] *Polynesian* is inapposite on the attorney's fees issue.

[9] *Blue* is an anomoly worth not repeating. Further, we don't know the *Blue* result on remand.

III.

CONCLUSION

These are cases of "broad significance" as a significant factor in determining the reliability of the federal judicial system. There cannot be one standard of conduct for IRS agents and another for everybody else. The "merits" and implications are broader than just these cases. Full briefing of these issues with complete Certified Appellate Records are required by the importance of these issues. See, e.g., *Harris* v. *Rivera*, ... U.S. ..... (1981) (*per curiam*) (Marshall, J., dissenting). Furthermore, notwithstanding the Solicitor's comments to the contrary, counsel and his clients do contest the statements of the Courts below when they get "personal" about this legal dispute. We consider those gratuitous statements to be unprofessional and unworthy of a truly independent judiciary.

Respectfully submitted,

Tabcor Sales Clearing, Inc.,
J. Richard Dema and Sally Dema

By: SHELDON R. WAXMAN,
one of their attorneys

Of Counsel:

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APPENDIX

SUPPLEMENTAL APPENDIX

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

Sheldon R. Waxman, Esq.
Suite 1115
30 West Washington
Chicago, Illinois 60602

December 24, 1981

RE: Tabcor Sales Clearing, Inc., et al. v. Department of the Treasury, et al., No. 81-979; J. Richard Dema and Sally Dema v. Internal Revenue Service, No. 80-981

Dear Mr. Waxman:

Your motion to consolidate in the above-entitled cases was received and filed December 22, 1981 and will be presented to the Court when the petitions are distributed.

Your motions to direct the Clerk of the United States Court of Appeals for the Seventh Circuit to transmit the records to this office will also be brought to the attention of the Court when the petitions are distributed. The Court prefers not to receive lower court records until the Court itself directs the Clerk to call for them.

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By */s/ Francis J. Lorson*
Francis J. Lorson
Chief Deputy Clerk

rwk

cc: Honorable Rex E. Lee
Thomas F. Strubbe, Esq., Clerk, US Court of Appeals for the Seventh Circuit (Your Nos. 79-1901, 80-1768, 80-2547, 80-2592, 81-1055, 80-1138, 80-1205, 80-1982)

(Letterhead of Shelly Waxman & Associates)

January 8, 1982

Alexander L. Stevas, Clerk
U.S. Supreme Court
Washington, D.C. 20543
Att: Francis J. Lorson

Re: Tabcor Sales Clearing, Inc., et al.

Dear Mr. Lorson:

Thank you for your letter, dated December 24, 1981. I want, however, to reassert that the documents—especially the *in camera* documents retained by the lower courts were requested because we believe they should be a part of the Certiorari Petitions.

We first asserted this at page 6 of the Petition #81-979 and, again, at page 3 of #81-981. If you feel it is necessary, please make this clear to the Justices.

Very truly yours,

/s/ Shelly Waxman
Shelly Waxman

cc: Hon. Rex E. Lee

Thomas F. Strubbe (for filing—Nos. 79-1901, 80-1768, 80-2547, 80-2592, 81-1055, 80-1138, 80-1295 and 80-1982)

H. Stuart Cunningham (for filing—Nos. 75 C2401, 78 C 2673, and 78 C 3992)

J.R. Dema